LEE FATT SENG

v.

HARPER GILFILLAN [1980] SDN. BHD.

SUPREME COURT, KUALA LUMPUR
GEORGE SEAH SCJ
HASHIM YEOP SANI SCJ
WAN HAMZAH SCJ
[CIVIL APPEAL NO. 400 OF 1985]
18 DECEMBER 1987

LABOUR LAW: *Employment - Employee retrenched after 22½ years' service with company - Termination benefits paid to employee - Employment (Termination and Lay-Off Benefits) Regulations 1980 - Whether computation of termination benefits by company correct - Interpretation of reg. 6 and meaning of "wages" - Benefits by company correct - Interpretation of reg. 6 and meaning of "wages" - Definition of "work done" - Whether rest days (Saturdays and Sundays) should be excluded from twelve completed months' service in computation of average true day's wages.*

This was an appeal by the appellant against the decision of the High Court which held that the rest days should not be excluded from the twelve completed months' service in the computation of average true day's wages under Reg. 6(2) of the Employment (Termination and Lay-Off Benefits) Regulations 1980.

It was argued on behalf of the appellant that in view of the words "work done" contained in the above definition, rest days, i.e., Saturdays and Sundays, should be excluded from the twelve completed months' service in the computation of average true day's wages under reg. 6(2) on the ground that no work was done on the rest days. However, the respondent company contended that the rest days should be included. In fact, an inquiry was held under the Employment Act, pursuant to the complaint to the Labour Department by the appellant/employee that the computation of the termination benefits by the Company was incorrect and the payment was short of the correct amount. The Penolong Pengarah Buruh agreed with the appellant's contention and accordingly the award of the termination benefits which he made under reg. 6(1)(c) was greater than the amount calculated and paid by the respondent company. The respondent company's appeal to the High Court was allowed and the High Court disagreed with the Penolong Pengarah Buruh and held that the rest days should not be excluded. Hence, this appeal by the employee.

Held:

[1] In the definition of "wages" in the Employment Act of Malaysia, the words "work done" are not expressly used with reference to any particular time or period. Therefore it was not correct to say that "wages" are only in respect of days on which work is actually done.

[2] For every purpose the concept that for monthly pay the number of working days in the month is irrelevant should be adopted unless it is clear from the provisions of the law that for a particular purpose it is intended that a different treatment should be given. In conformity with this concept the average daily wages in a particular month should be arrived at by dividing the amount of the monthly wages with the total number of days in that month as this method seems to be consistent with the term "average true day's wages" contained in reg. 6(2) of the Employment (Termination and Lay-Off Benefits) Regulations 1980.

[3] It seems that the words "work done" in the definition of "wages" are used so as to stress on the requirement that the remuneration must be for work done in respect of the contract of service of the employee concerned so that any payment made to him by the employer *ex gratia*, not for work done or to be done, and not in connection with the contract of service, is not part of the wages.

[4] In the circumstances, the decision of High Court was correct and the appeal should be dismissed.

[Appeal dismissed.]

Cases referred to:
Keast v. The Barrow Hematite Steel Company [1899] 15 TLR 141
Bird v. British Celanese Limited [1945] All ER 488

Legislation Referred to:
Employment Act 1955, s. 2(1)
Employment Act (Cap 122) [Sing], s. 41(1)
Employment (Termination and Lay-Off Benefits) Regulations 1980, reg. 6, (1)(c), (2)

For the appellant - Gurdial Singh Nijar (Mohideen Abdul Kader and Menakshi Raman with him); M/s. Nijar & Nijar
For the respondent - C.V. Das; M/s. Shook Lin & Bok

JUDGMENT

Wan Hamzah SCJ:

The appellant was an employee of the respondent, Harper Gilfillan [1980] Sdn. Bhd. (the Company), on a monthly salary. After working with the Company for about 22½ years he was retrenched on 1 June 1983. The company paid him a certain amount of money as termination benefits under the Employment (Termination and Lay-Off Benefits) Regulations 1980, but he complained to the Labour Department that the computation of the termination benefits by the Company was incorrect and the payment was short of the correct amount. The Penolong Pengarah Buruh held an inquiry into the dispute under the Employment Act. The appellant's ground of complaint relates to the interpretation of reg. 6 and the meaning of "wages". That regulation in so far as it is relevant to this case reads:

> 6.(1) Subject to the provisions of the Regulations, the amount of termination or lay-off benefits payment to which an employee is entitled in any case shall not be less than:
>
> (a) ...
>
> (b) ...
>
> (c) twenty days' wages for every year of employment under a continuous contract of service with the employer if he has been employed by that employer for five years or more,
>
> and *pro-rata* as respect an incomplete year, calculated to the nearest month.
>
> (2) For the purposes of this regulation "wages" shall have the meaning assigned thereto under s. 2(1) of the Employment Act and "a day's wages" shall be computed in such a manner so as to give the employee his average true day's wages calculated over the period of twelve completed months' service immediately preceding the relevant date.

In s. 2(1) of the Act there is the following definition:

> "wages" means all remuneration which is payable to an employee for work done in respect of his contract of service but does not include:

(a) the value of any house accommodation or the supply of any food, fuel, light or water or medical attendance, or of any approved amenity or approved service;

(b) any contribution paid by the employer on his own account to any pension fund, superannuation scheme, retrenchment, termination, lay-off or retirement scheme, thrift scheme, or any other fund or scheme established for the benefit or welfare of the employee;

(c) any travelling allowance or the value of any travelling concession;

(d) any sum payable to the employee to defray special expenses entailed on him by the nature of his employment;

(e) any gratuity payable on discharge or retirement; or

(f) any annual bonus or any part of any annual bonus which is not payable under the contract of service.

It was argued on behalf of the appellant that in view of the words "work done" contained in the above definition, rest days (i.e., Saturdays and Sundays) should be excluded from the twelve completed months' service in the computation of average true day's wages under reg. 6(2) on the ground that no work was done on the rest days, whereas the company contended that the rest days should be included. With the total number of days in the twelve completed months decreased by the number of rest days, the amount of average true day's wages would be greater than the amount calculated with rest days included in the total number of days in the twelve completed months. The Penolong Pengarah Buruh agreed to the appellant's contention and accordingly the award of termination benefits which he made under reg. 6(1)(c) was greater than the amount calculated and paid by the Company. The Company appealed to the High Court, and the High Court disagreed with the Penolong Pengarah Buruh and held that the rest days should not be excluded.

Before us it was again contended on behalf of the appellant that a monthly paid employee is not paid wages in respect of his rest days, and he is paid in respect of five days of work in each week. Reliance was also placed on a passage in the judgment of the Chief Justice of Singapore in the unreported case of *Union Carbide Singapore Private Limited v. M.P. Gindon Nair*, which reads:

> ... his monthly salary is computed on the basis that Saturdays and Sundays are non-working days for him and that his monthly salary is exclusive of payment for Saturdays and Sundays during which he is under no contractual obligation to work to earn his monthly salary.

In that case Saturdays were not working days for the employee under the contract, and in 1971 four public holidays fell on Saturdays. The issue was whether he was entitled to be paid at his ordinary rate of pay in respect of the four public holidays which fell on Saturdays. The Chief Justice held that he was entitled to the payment by virtue of s. 41(1) of the Employment Act of Singapore which provided that every employee shall be entitled to a paid holiday at his ordinary rate of pay provided that if any of the holidays falls on a rest day the working day following immediately thereafter shall be a paid holiday in substitution therefore. So the judgment of the Chief Justice was made on an issue which was entirely different from the issue in the present case. Under the collective agreement the hours of work should not be more than 44 hours per week and the 44 hours of work were spread out and fixed on Monday to Friday, leaving Saturday and Sunday free. He worked the full 44 hours each week from Monday to Friday. The Chief Justice made the above-quoted statement expressly on the basis of the facts of that particular case especially the fact that the employee worked the full 44 hours per five-day week from Monday to Friday. In view of these, I do

not think that the above-quoted statement of the Chief Justice can have any bearing in the present case. On the other hand, the fact that the employee was entitled to be paid in respect of the holidays which fell on Saturdays would be more consistent with the concept that Saturdays and other rest days are to be treated as working days for the purpose of ascertaining average day's wages, than with the contention that the rest days should be excluded for that purpose.

In the definition of "wages" in the Employment Act of Malaysia, the words "work done" are not expressly used with reference to any particular time or period. There is no indication anywhere that they are intended to be used with reference to any particular time or period. Therefore in my opinion it is not correct to say that "wages" are only in respect of days on which work is actually done. The concept of monthly pay is that the wages or salary for a particular month is of the same amount as that for every other month. So the salary for January which has 31 days is of the same amount as the salary for February which may have only 29 or 28 days. The wages or salary is of the same amount irrespective of whether there are the same number of working days in January as in any other month. In other words the number of working days in the month is not relevant. For every purpose the concept that for monthly pay the number of working days in the month is irrelevant should be adopted unless it is clear from the provisions of the law that for a particular purpose it is intended that a different treatment should be given. In conformity with this concept the average daily wages in a particular month should be arrived at by dividing the amount of the monthly wages with the total number of days in that month. This method seems to be consistent with the term "average true day's wages" contained in Reg. 6(2).

It seems that the words "work done" in the definition of "wages" are used so as to stress on the requirement that the remuneration must be for work done in respect of the contract of service of the employee concerned, so that any payment made to him by the employer *ex gratia*, not for work done or to be done, and not in connection with the contract of service, is not part of the wages.

In *Keast v. The Barrow Hematite Steel Company* [1899] 15 TLR 141 a workman brought a claim against his employer for compensation under the Workmen's Compensation Act 1897. Under the first schedule to the Act the compensation in respect of the period of incapacity was to be computed on certain percentage of the "average weekly earnings". For the employer it was contended that the true method of arriving at the "average weekly earnings" within the meaning of the first schedule to the Act, was to take the total amount the workman had earned during the previous twelve months - that was to say, if he had been so long employed - and divide that amount by 52, the number of weeks in the year. The contention on the part of the workman was that, in making the calculation, those weeks or days in weeks during which the workman had not been actually employed ought to be excluded, and that, therefore, where he had not been working continuously throughout the whole year, the divisor ought not to be 52, but some lower number. It was held by the Court of Appeal that the total amount of three year's earning ought to have been divided by 52, and not by any less number excluding the weeks when the workman was not at work.

In my judgment the decision of the High Court is correct. This appeal should be dismissed.

George Seah SCJ:

I have read the judgments prepared by my learned brothers, Hashim Yeop Sani SCJ and Wan Hamzah SCJ. I agree that the appeal should dismissed for the reasons stated in the judgment of Wan Hamzah SCJ.

Hashim Yeop Sani SCJ (dissenting):

The appellant was dissatisfied with the computation in order to arrive at termination benefits due to him under the Employment (Termination and Lay-Off Benefits) Regulations 1980 (the Regulations) when he was retrenched after 22½ years' service with the respondent company. The appellant contended that rest days (Saturdays and Sundays) should be excluded from the computation in order to arrive at his average true day's wages under Reg. 6(2). The respondent company on the other hand argued that rest days should be included.

What the appellant is entitled to under the Regulations is termination benefits which shall not be less than 20 days' wages for every year of employment (reg. 6(1)(c)) and the amount to be computed is that which is to give him his "average true day's wages" for every 12 completed months of services (Reg. 6(2)). It is clear from the language of the Regulations that for the purpose of giving termination benefits under reg. 6(1) and (2) we cannot but must first ascertain what is the true day's wages.

The appellant's complaint was that the computation of the termination benefits that was given to him should have excluded rest days to arrive at the correct amount to reflect his average true day's wages. In my view his complaint was perfectly and legally justified because he was under no contractual obligation to work on rest days.

The phrase "average true day's wages" in reg. 6(2) and the words "for work done in respect of his contract of service" in the definition of wages in s. 2(1) of the Employment Act are significant. Therefore for the purpose of computing the average true day's wages rest days should be excluded because he was under no contractual obligation to work on rest days to earn his monthly salary. But public holidays should however be included even if the public holiday falls on a rest day.

The words "for work done" in the definition of wages must be given sufficient meaning and the words are not merely to exclude *ex gratia* payments because such payments are already excluded by the definition of "wages" itself.

What is wage is the sum agreed between the employer and the workman as payable for the work and it would seem clear that no wages were payable under the contract of employment for the rest days.

There are no cases directly in point but *Bird v. British Celanese Limited* [1945] All ER 488 shows the importance of considering the contract of employment. The contract of employment in that case was oral but it included the acceptance of internal rules for work and behaviour. One of those made known to the workman was that the employer could temporarily suspend a workman from employment with a proportionate deduction from a week's wages for breaches of the factory rules such as wilful misconduct, breach of duty or disobedience to an order. Following the refusal of the workman to do certain work he was suspended for two days. Subsequently he agreed to comply and was reinstated. The workman brought an action in respect of the two days for £2 10s. 0d. as damages, or alternatively as wages. The County Court Judge found that the parties had contracted upon the terms that the contract might be suspended if the workman was guilty of serious misconduct and found that the workman had been so guilty; but he gave judgment for the workman on the footing that the Truck Act having made the suspension clause illegal, the employer had repudiated his contract entitling the workman to recover damages. On appeal it was held that the suspension having been in accordance with the terms of employment the mutual obligation of the parties ceased for the two days of the suspension. Therefore non-payment of the two days' wages was neither in the nature of a fine nor deduction to be computed by the appellant and in these

circumstances the Truck Act 1896 did not apply. In the judgment of Lawrence LJ at p. 492 it was made clear that the contract was not a contract for any deduction from the sum contracted to be paid since no sum was ever contracted to be paid during a period of suspension.

I would accordingly allow the appeal with costs here and below. The order of the Assistant Director of Labour should be reinstated.

Also found at [1988] 1 CLJ 270